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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

TENA C. GASTON,

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent,

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN APPROVING THE ADMISSION OF THE TESTIMONY OF JOHNNY BARRY?

II. DID THE COURT OF APPEALS ERR IN APPROVING THE EXCLUSION OF THE TESTIMONY OF KATHY HILL?

III. DID THE COURT OF APPEALS ERR IN APPROVING THE CRIMINAL FORFEITURE OF PETITIONER'S HOME WHERE THAT FORFEITURE WAS DISPROPORTIONATE TO THE GRAVITY OF THE OFFENSE?

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OPINIONS BELOW

Petitioner was convicted in the United States District Court for the District of South Carolina, at Spartanburg, CR-97-459. The Fourth Circuit Court of Appeals affirmed the conviction in an unpublished per curiam opinion decided April 9, 1999.

JURISDICTION

Jurisdiction of the Supreme Court is invoked pursuant to Title 28, United States Code, §1254. The opinion of the Fourth Circuit was entered on April 9, 1999.

STATUTES INVOLVED

Federal Rule of Evidence 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Federal Rule of Evidence 404(B): "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

Federal Rule of Evidence 608(b): "Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into

on cross- examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

STATEMENT OF THE CASE

Petitioner was convicted of one count of conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 846 (1994). Petitioner appealed her conviction and also challenged the forfeiture of her undivided half interest in her land and home near Woodruff, South Carolina.

This case began on June 4, 1996, when the Anderson County Sheriff's Department received a tip that a Federal Express package was to be delivered to Whitfield Upholstery in Belton, South Carolina, and the package would possibly contain methamphetamine. With the assistance of a canine narcotics unit, authorities located the package at the Federal Express office. A search of the package revealed approximately one-half of a pound of methamphetamine.

Sam Whitfield alleged that he obtained the methamphetamine pursuant to an arrangement with Petitioner. Whitfield alleged that he obtained methamphetamine by giving money to Petitioner which Petitioner sent to "Pop" in California. Upon receipt of the money, Pop allegedly sent the methamphetamine to Whitfield via Federal Express.

On June 5, 1997, Whitfield, in cooperation with authorities, allegedly called Petitioner and arranged to give her money to purchase a pound of methamphetamine. Whitfield went to Petitioner's home and left the purchase money on a table. Whitfield alleged that he told Petitioner, "there was the money for a pound," and that she replied that she would make arrangements with Pop the next day. On cross-examination, Whitfield admitted that the tape from the body microphone he wore at Petitioner's house contained no reference to methamphetamine. Whitfield claimed that his alleged statement regarding "the money for a pound" just did not come out on the tape. (JA 76).

On cross-examination, Whitfield admitted that he was convicted in 1987 or 1988 of committing a lewd act on a thirteen or fourteen year old girl. Whitfield admitted that he turned one of his buyers, Tina Franklin, in to authorities and that Franklin was actually a former girlfriend. Whitfield admitted that he "dated" Petitioner at one time. He then admitted that he had a sexual relationship with Petitioner before he implicated her to the authorities as his source of methamphetamine. Whitfield admitted that he was first a bouncer for and then partners with Bob and Roger Bennefield in 1987. Whitfield admitted to being a bouncer for Gene Burch since 1987. Whitfield denied that he sold Gene Burch methamphetamine. He denied stating that he had an unlimited supply of methamphetamine through the Outlaw motorcycle gang. Whitfield admitted that people who turn on the Outlaw motorcycle gang can end up dead and that it was easier to inform on Petitioner. (JA 70).

Whitfield admitted that when he was first interviewed, he told Agent Brown that he did not know who Pop was. Whitfield admitted that he "lied entirely" about going to California to establish a connection with a person to supply methamphetamine. (JA 78). Whitfield admitted that after he met Pop, he flew out to California "the rest of the time and brought it back." (JA 79). Whitfield denied that he ever had Petitioner do favors for him. He denied that she ran errands, like going to home depot, for him and he denied that Petitioner ever did billing and accounting work for him. (JA 83).

F.B.I. Agent Weronik was the evidence custodian in the search of Petitioner's home on June 5, 1997. Weronik identified several items which were found in Petitioner's home including: cash wrapped in aluminum foil, a federal express air bill from Whitfield Upholstery to Bert Rowland dated June 3, 1997; cash in a lock box, cash in a book; a UPS shipping invoice from T. Gaston to Bert Rowland, dated June 3, 1997; an address book, a check book, an envelope containing the $21,400 in buy money left by Whitfield; an envelope containing a brown powder substance; records; manila envelopes; Federal Express and UPS invoices. Weronik testified

that authorities found two ounces of methamphetamine on a gift bag.

Captain McCord also participated in the search of Petitioner's house. He testified that he found: an assortment of letters; phone records; a latex glove; and an electronic scale. McCord testified that persons in the drug trade "quite often" use such scales. On cross-examination, McCord testified that neither the glove nor the scales were ever tested for traces of drugs. McCord was unaware that Petitioner had two pet frogs or that the glove was found in the same location with frog food and polish. (JA 111).

Lieutenant Williams participated in the search of the house. Williams found the two ounces of methamphetamine in the Pier One gift bag. He admitted that as far as he knew no fingerprints were done on the bag. (JA 119). Agent Hamod found a baby gift box containing $11,000 in cash. Hamod was unaware of any fingerprints being done on the box or on the cash. (JA 126).

Agent Martin Brown was the case agent on this case. Agent Brown testified that when Sam Whitfield was initially interviewed, he stated that he had never met the individual in California. When Whitfield was re-interviewed, he admitted that he had personally met and knew Pops and in fact had actually flown to California on several occasions where he met Pops and obtained methamphetamine. (JA 131).

Agent Brown identified the paper money wrappers with handwriting on them which were found in Petitioner's home. Agent Brown was not aware of the fact that Petitioner received cash money on a regular basis throughout her life. Agent Brown testified that there was approximately $110,000 in cash in Petitioner's home. (JA 156).

Larry Blackwell testified on behalf of Petitioner. Blackwell knew Mr. Burch who ran a bar. Blackwell testified that he was present with Mr. Burch on three occasions in 1989 when Burch purchased methamphetamine from a big guy named Sam. (JA 172). Larry Blackwell overheard "Sam" state that it wasn't a problem and that he could get as much as he wanted because "Sam" was "down

with the Outlaws and there was "plenty" of it. Blackwell identified "Sam" as Sam Whitfield.

Petitioner's brother, Steve Gaston testified for the defense. Gaston has been in the trucking business for thirty-two years. Gaston testified that he uses cash in his business and identified the lock box found in Petitioner's home as his. (JA 213). Gaston identified the ribbon from an adding machine and his handwriting in the lockbox. Gaston testified that he gave the lock-box to James Martin to give to Petitioner for safe-keeping. Steve explained that he was away from home a good amount of time. Petitioner, on the other hand, was usually at home. (JA 223).

Steve testified that his grandmother had a pattern and habit of giving money to Petitioner. He testified that he was present on more than one occasion when his grandmother gave Petitioner large amounts of cash. Steve identified the handwriting on the paper wrapping the cash as Petitioner's. He testified that Petitioner always marked the money her grandmother gave her with the dates and that she saved that money. (JA 218). Steve testified that his mother gave Tena some $80, 000. Steve further testified that Petitioner's father died and left her $80,000. Steve testified that Petitioner used the scales to care for her pet frogs. (JA 219).

James Martin confirmed Steve Gaston's testimony. Martin testified that in May of 1997, Steve Gaston gave him a lockbox to give to Petitioner and that he did so. (JA 227).

ARGUMENT

I. The Court of Appeals erred in approving the admission of the testimony of Johnny Barry.

The Government included the name of Johnny Barry as a prospective witness during jury selection on Monday, October 6, 1997. The next day, Defense Counsel went to Cross Anchor, South Carolina, where Barry was incarcerated. Counsel was able to interview Barry. Barry stated "point blank" that he had no information which would incriminate Petitioner. (JA 34).

On Thursday night, October 9, 1997, Agent Brown, the officer in charge of the investigation of the Government's case

against Petitioner told Defense Counsel that he had secured through a Spartanburg attorney a proffer agreement from Johnny Barry. Agent Brown told Defense Counsel that he was going to Cross Anchor to interview Johnny Barry. On the morning of trial, October 10, 1997, Defense Counsel was handed a 302 consisting of a page and a half narrative from Agent Brown regarding his interview with Johnny Barry. The night before Petitioner's trial, Johnny Barry told Agent Brown that he had purchased recreational amounts of methamphetamine from Petitioner prior to May of 1996.

The indictment in this case alleged that Petitioner was involved in a methamphetamine conspiracy for a four day period in June of 1997. The extremely narrow time frame of the indictment was from June 3, 1997 to June 6, 1997. Johnny Barry alleged only that Petitioner committed unrelated bad acts over a year before the conspiracy charged in the indictment. Counsel for Petitioner argued that the testimony of Barry was therefore not relevant to the prosecution of this case and that the unfairly prejudicial effect of the Barry testimony far outweighed any probative value. Counsel argued that, therefore, the evidence should be excluded under Rules 403 and 404(b). Finally, Counsel for Petitioner argued that the last minute revelation of the information from Barry prejudiced Petitioner. There were significant areas of impeachment that could have been developed regarding Barry, but Counsel did not have an opportunity to develop such testimony given the fact that he was given the Barry 302 on the morning of trial.

The Government argued that they had only talked to Barry the eve of trial and therefore could not have given any more notice to the defense. However, the Government was then forced to acknowledge that, in fact, Agent Brown went to Cross Anchor and spoke to Barry on September 30, 1997.

The District Court judge ruled that the evidence was admissible but that the Government would not be allowed to call Barry until the end of their case. When Barry was called to the stand, Defense Counsel renewed his objections. The judge ruled that Barry was permitted to testify. (JA 180).

Barry testified that he had known Petitioner since she was a teenager. He testified that on May 16, 1996, he was stopped by Spartanburg law enforcement and found to be carrying 119 grams of methamphetamine. Barry testified that he obtained the drugs from Petitioner on the morning of his arrest. Barry testified that he had been purchasing methamphetamine in one ounce amounts from Petitioner for six months prior to May 16, 1996. (JA 182-183).

Barry admitted that on Tuesday, October 6, 1997, less than a week before Petitioner's trial, he "probably" did say that he did not know anything against Petitioner. (JA 194).

Barry's testimony was not relevant to the 1997, four day conspiracy for which Petitioner was indicted. Federal Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...

Federal Rule of Evidence 404(b) prohibits the use of "evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity or knowledge." Huddleston v. United States, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988). Thus, "[t]he threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." Id. at 686, 108 S.Ct. at 1499. While 404(b) is viewed as an inclusionary rule, United States v. Mark, 943 F.2d 444, 447 (4th Cir. 1991), evidence of prior bad acts is not admissible if it is introduced for the sole purpose of proving criminal disposition. United States v. Russell, 971 F.2d 1098 (4th Cir.1992), cert. denied, 506 U.S. 1066, 113 S.Ct. 1013, 122 L.Ed.2d 161 (1993).

The evidence presented through the testimony of Barry was relevant only to show that Petitioner had previously dealt in methamphetamine. The Government sought to convince the jury that if Petitioner had done it before, she was likely to do it again. This is propensity evidence. The District Court judge erred in allowing evidence which was relevant to prove only criminal disposition and the Fourth Circuit erred in approving the admission of this evidence.

The Government's argument that this evidence was properly admitted to show motive or intent ignores the fact that over a year passed between the two alleged incidents. In United States v. McMillon, 14 F.3d 948 (4th Cir. 1994), the court found that where the disputed statement relates to events which "occurred well outside the charged dates of the conspiracy and were not directly related to the current conspiracy, the statements cannot be said to bear upon a relevant issue in the case." This is the case here. The statements made by Barry related to events which occurred over a year before and thus "well outside" the charged dates of the conspiracy. Therefore they were not directly related to the current conspiracy and thus did not bear upon a relevant issue in the case. Petitioner's activities a year before provided no information regarding her state of mind at the time of the indicted conduct. Therefore, the evidence should have been excluded. In McMillon, the court found that admission of such evidence was harmless due to overwhelming evidence of McMillon's guilt. No such quantum of evidence existed here.

Assuming for the sake of argument that this evidence had some negligible relevance, the evidence should nevertheless have been excluded given the fact that the probative value was outweighed by the unfair prejudicial effect. Rule 403 provides,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Fourth Circuit found that Barry's testimony regarding Petitioner's activities a year before the crime charged was relevant to the issues of Petitioner's knowledge of the drug business and her knowledge of and intent to distribute methamphetamine. Petitioner would argue that because a year had passed, the prior activities provided little information regarding Petitioner's knowledge and intent at the time of the crime charged.

The proper question under Rule 403, is whether the evidence has the potential to cause undue prejudice, and if so, whether the danger of such undue prejudice substantially outweighs its probative value. In addressing Petitioner's argument that the probative value of Barry's testimony was outweighed by the danger of unfair prejudice, the Fourth Circuit simply noted that the judge gave a limiting instruction which "ameliorated" the unfair prejudice. Petitioner would argue that the judge's brief limiting instruction did not serve to sufficiently ameliorate the danger of unfair prejudice so that the negligible probative value of this evidence outweighed the remaining prejudice. Under these circumstances, the evidence should have been excluded.

Given the fact that Barry's testimony related to activities outside the scope of the indicted conspiracy here, it had little relevance. In contrast, the danger that this evidence would unfairly prejudice Petitioner in the eyes of the jury was extreme. The jury very likely used this evidence to conclude that Petitioner was a person with the criminal propensity to deal in methamphetamine. The danger of such reasoning on the part of the jury should have led the judge to exclude this evidence.

In addition, the testimony of Barry should certainly have been excluded given the lack of notice to the defense. Rule 404(b) requires notice of extrinsic act evidence, "...provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

Here, Petitioner learned of the general nature of Barry's testimony on the morning of trial. The trial judge sought to ameliorate the harm to Petitioner by requiring the Government to

present Barry as its last witness. The judge noted that this ruling would give Defense Counsel several days to prepare for Barry. The judge failed to take into account the fact that Defense Counsel was occupied during that period with trying the case. In addition, the lapse of several days did nothing to address the fact that Petitioner was given no time to adjust her trial strategy to accommodate the last minute inclusion of Johnny Barry. The judge ruled that the testimony would be admitted and within mere moments Defense Counsel was making his opening statement.

The Fourth Circuit found that Barry provided information to the Government on the night before the trial and that the Government provided the information to Defense Counsel on the morning of trial. The Fourth Circuit noted that the trial court ordered the Government not to call Barry as a witness until the second week of the trial in order to give Petitioner a chance to prepare for this witness. The Fourth Circuit found that under these circumstances, Petitioner was not prejudiced by delayed notice about the Government's intention to call Barry as a witness.

The court failed to address Petitioner's argument that her counsel was given no time to adjust his trial strategy to accommodate the new evidence which he learned of literally moments before making his opening statement to the jury. Defense Counsel had prepared for trial and crafted his trial strategy based on the evidence in the Government's file. The addition of this devastating witness minutes before the start of trial made Counsel's preparation for trial meaningless. Petitioner was therefore prejudiced by the Government's failure to give reasonable notice of its intent to use extrinsic act evidence.

II. The Court of Appeals erred in approving the exclusion of the testimony of defense witness Kathy Hill.

As noted above, Defense Counsel had little time to prepare for Johnny Barry. Counsel was, however, able to locate one witness who was able to provide testimony impeaching that of Barry. The witness was Kathy Hill. Kathy Hill was not allowed to testify, but her testimony was proffered.

Hill testified that in the winter of 1996, Johnny Barry came to her place of business and told her that he was going to drive to Exit 40. Hill testified that Barry was "pretty messed up" and too intoxicated to drive. Hill agreed to drive Barry to Exit 40. At the exit, Barry told Hill to pull into a Burger King parking lot. Barry left Hill's truck and got into the car with Sam Whitfield. Hill testified that she knows Whitfield and recognized him. When Barry came back to Hill's truck, he told her that he had dealings with Whitfield every now and then. Hill testified that she was shocked to hear that Barry was involved with Sam Whitfield because Whitfield was a known drug dealer and a violent man.

Defense Counsel argued that Hill's testimony was relevant to impeach Johnny Barry's testimony that he did not know or deal with Sam Whitfield. Johnny Barry had testified that he did not know Sam Whitfield. He then admitted, "I think I've met him." But maintained that he had never obtained methamphetamine from Whitfield. Kathy Hill's testimony thus directly contradicted Barry's testimony. The judge ruled that this was a collateral matter and refused to allow Hill's testimony to be used to impeach Barry.

The Fourth Circuit found that the district court did not abuse its discretion by disallowing Hill's testimony to impeach Barry. The Fourth Circuit found that Hill's testimony was proffered not to impeach Barry's testimony about his relationship with Petitioner, but to impeach his testimony about his relationship with Sam Whitfield, which the court held was a collateral matter. Petitioner would argue that the nature of Sam Whitfield's drug operation and the identity of those he dealt drugs with was not a collateral issue, but instead, the central issue in this case.

In Nygren v. Perry, 101 F.3d 695, 1996 WL 665027 (4th Cir. 1996), Nygren argued that Perry was impermissibly allowed to impeach a witness with extrinsic evidence on an issue collateral to the main issue at trial. The Fourth Circuit found that the testimony at issue was not a collateral matter because it addressed the central issue in the case. The court noted, "We have held that "Rule 608(b) should not be read so broadly as to disallow the presentation of extrinsic evidence that is probative of a material issue in a case." citing United States v. Smith Grading & Paving, 760 F.2d 527, 531

(4th Cir.), cert. denied, 474 U.S. 1005 (1985). The court stated, "Interfering with the admission of such extrinsic evidence would be inconsistent with "the goal of ascertaining the truth in judicial proceedings." Here, the shape of Whitfield's drug business was certainly a material issue in this case. In addition, the Government made the question of Barry's prior dealings material by presenting his testimony. Therefore, the testimony of Kathy Hill went to a material issue and should have been permitted.

The Nygren court further noted, "While extrinsic evidence offered to impeach the credibility a witness is inadmissible under Federal Rule of Evidence 608(b), if such evidence is also relevant and admissible for some other purpose, then it may be introduced. citing United States v. Abel, 469 U.S. 45, 56 (1984) ("It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.").

"While falling within Rule 608(b), impeachment by contradiction is evidence that has dual relevance. It is offered not only to impeach the credibility of a witness, but it is also offered to prove some material fact at issue in the case, or it is independently admissible to impeach by showing such things as bias." United States v. Grover, 85 F.3d 617, 1996 WL 226262 (4th Cir. 1996). The fact that Johnny Barry previously dealt with Whitfield and falsely denied the relationship under oath was relevant to show Barry's bias. Therefore, even if this had been a collateral issue, the testimony of Kathy Hill should nonetheless have been admitted to show the bias of the Government's witness.

III. The Court of Appeals erred in approving the forfeiture of Petitioner's home.

After Petitioner's conviction, a criminal forfeiture proceeding was held. The Government sought forfeiture of the home located at 881 Bens Creek Road, which is owned by Petitioner, and her mother, Mildred E. Gaston. The Government

sought forfeiture of Petitioner's home purely on a facilitation theory.

Agent Brown testified that the transactions in methamphetamine were conducted from Petitioner's house. Agent Brown was asked what evidence he had that Petitioner's home facilitated dealings in methamphetamine. He first responded that two ounces of methamphetamine were found in the house. However, these two ounces were not part of the crime for which Petitioner was convicted. Petitioner was never charged in relation to these drugs. Agent Brown next testified that a set of scales which could have been used to weigh methamphetamine were found in the house. Petitioner presented the testimony of several witnesses that these scales were actually used to weigh her pet frogs.

Agent Brown further testified that large amounts of cash were found in the house. Petitioner's brother, Steve, testified that $46, 000 of that cash was his money that he had left with Petitioner for safekeeping. This testimony was confirmed by the testimony of James Martin who took the box to Petitioner. Steve explained that this was money that he put aside to buy new trucks for his trucking business. Steve testified that Petitioner has always had his money for him when he asks for it.

Petitioner further presented evidence that the other cash in the house was hers. Petitioner inherited money and was given large amounts of cash by her grandmother. Brian Fowler is Petitioner's nephew. He testified that everyone in their family was "absolutely" in the habit of holding cash as opposed to using banks. Brian testified that they were all taught the lesson of the Depression, that banks are not necessarily the safest place to keep money. Brian testified that the handwriting on some of the paper labels used to wrap the money was his grandmother's handwriting. Brian testified that when his grandmother gave the grandchildren money, she always precounted, wrapped, and labeled it. The wrappers found around the cash in Petitioner's home were dated and the dates went back to 1974.

The only remaining evidence cited as supporting facilitation was "numerous" papers and documents and receipts of Federal

Express and UPS packaging. Agent Brown admitted that although the Government had receipts which showed that something was sent via a carrier, they had no way of knowing what was in the envelope or package related to the receipt. Defense Counsel asked Brown, "Is this what you have, a sending label?...Are you making an inference then that something other than a letter or anything else was attached to this label number Government's exhibit 13? How do you know what this was attached to? Did you retrieve it, the outgoing package?" Agent Brown answered that the Government did not retrieve the outgoing packages and that they just had the receipts.

Agent Brown admitted that he personally witnessed only one transaction being arranged between Petitioner and Whitfield. The result of this one transaction was that Whitfield left a bag containing $21,400 in Petitioner's house. Agent Brown admitted that the Government did not even know whether Petitioner had handled or opened the bag. Shortly after Whitfield left the bag of money at Petitioner's house, authorities arrived with a search warrant and seized the bag of money. Agent Brown agreed that the Government actually had only one order for one pound of methamphetamine and that this was set up by the Government. Agent Brown confirmed Whitfield's testimony that on May 28, 1998, he met Petitioner at the V.A. hospital and not at her home to arrange an order for methamphetamine.

Petitioner argued that her house was used only at the request of a Government agent and that the forfeiture was disproportionate to the gravity of her offense. The Government had convincing evidence of only one transaction taking place at Petitioner's house. This incident took place in Petitioner' s home because Sam Whitfield (at this point a government agent) wanted it too. In addition, the money was only in the home for very short period, less than the few hours.

The Fourth Circuit found that the forfeiture was not grossly disproportional to the gravity of her offense. However, the Fourth Circuit itself noted that Petitioner faced fines as low as $20,000 and the value of her home was $240,000. Petitioner would argue that a forfeiture which exceeds the lowest fine which could be imposed by

a factor of ten is by definition grossly disproportional. Furthermore, Petitioner was convicted of involvement in a crime that lasted four days from start to finish. Forfeiture of her home on the basis of this conviction is grossly disproportional.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

September 9, 1999

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TENA C. GASTON,
Defendant-Appellant.

No. 98-4456

Appeal from the United States District Court
for the District of South Carolina, at Spartanburg.
William B. Traxler, Jr., District Judge.
(CR-97-459)

Submitted: February 26, 1999

Decided: April 9, 1999

Before NIEMEYER, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Jack B. Swerling, Columbia, South Carolina, for Appellant. J. Rene Josey, United States Attorney, E. Jean Howard, Assistant United States Attorney, Greenville, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Tena C. Gaston appeals from her conviction on one count of conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. § 846 (1994). Finding her claims meritless, we affirm.

Gaston first charges that the trial court erred by admitting the testimony of prosecution witness, Johnny Barry, because defense counsel received inadequate notice of the Government's intention to call this witness and because his testimony violated Rule 404(b) of the Federal Rules of Evidence. The Government first notified defense counsel that Barry was a prospective witness on October 6, 1997, during jury selection. Before commencement of the trial on the morning of October 10, the Government provided defense counsel with documentation of the substance of Barry's testimony, namely that Barry had purchased methamphetamine from Gaston before May 1996. Gaston argues that the short notice concerning Barry's testimony unfairly prejudiced her.

Under Fed. R. Evid. 404(b), the prosecution must give the defense reasonable notice in advance of trial of its intention to offer evidence of prior bad acts. Here, the Government did not learn about Barry until several days before the trial. The Government notified defense counsel about Barry on October 6. Barry provided no information to the Government when he first was interviewed on September 30; the Government then interviewed Barry the night before the trial and provided that information to defense counsel the morning of the trial. The trial court ordered the Government not to call Barry as a witness until the second week of the trial in order to give Gaston a chance to prepare for this witness. We find that under these circumstances Gaston was not prejudiced by delayed notice about the Government's intention to call Barry as a witness.

Gaston asserts that Barry's testimony was inadmissible because it was not relevant to the charged conspiracy. Gaston was charged with conspiracy to possess with intent to distribute methamphetamine from June 3, 1997, to June 6, 1997. Barry testified that he bought metham-

phetamine from Gaston six or eight times, usually in one-ounce quantities, for about a six month period ending in May 1996, often at Gaston's house. Gaston argues that the one-year gap between the conduct about which Barry testified and the conduct charged in the indictment rendered Barry's testimony irrelevant.

Evidence of other crimes is not admissible to prove bad character or criminal propensity. *See* Fed. R. Evid. 404(b). Such evidence is admissible, however, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This rule is one of inclusion, rather than exclusion. *See United States v. Aramony*, 88 F.3d 1369, 1377 (4th Cir. 1996). Even if the evidence is relevant under Rule 404(b), it must be more probative than prejudicial. *See* Fed. R. Evid. 403. "The prejudice which the rule is designed to prevent is jury emotionalism or irrationality." *United States v. Greenwood*, 796 F.2d 49, 53 (4th Cir. 1986). This court reviews the admission of Rule 404(b) evidence for abuse of discretion.

Barry's testimony about his methamphetamine dealings with Gaston were relevant to the issues of Gaston's knowledge of the drug business and her knowledge of and intent to distribute methamphetamine. The court provided both a limiting instruction and a jury instruction to ameliorate any potential prejudice caused by Barry's testimony. Under these circumstances, we find that the district court did not abuse its discretion by admitting this evidence.

Next, Gaston contends that the district court erred by excluding the testimony of Kathy Hill, a witness whose testimony Gaston planned to use to impeach Barry. Specifically, Gaston planned to impeach Barry's testimony that he had never obtained methamphetamine from Sam Whitfield by having Hill testify about an incident in 1996 when she drove Barry somewhere to meet with Whitfield. Hill's proffered testimony indicated that Barry did not tell her he had drug dealings with Whitfield, but that she deduced that the relationship concerned drugs because she knew Whitfield "from the past."

Although a defendant may cross-examine a witness for impeachment purposes, including bias, we find that the district court did not abuse its discretion by disallowing Hill's testimony to impeach Barry. *See* Fed. R. Evid. 608(b). *Cf. United States v. Ling*, 581 F.2d 1118,

1120-21 (4th Cir. 1978) (where defendant is cross-examined to impeach his credibility regarding prior bad acts, examiner may not, over defendant's objections, introduce independent proof that his statements are false). Hill's testimony was proffered not to impeach Barry's testimony about his relationship with Gaston, but to impeach his testimony about his relationship with Whitfield, which was a collateral matter.

Gaston also challenges the criminal forfeiture of her undivided half interest in her land and home near Woodruff, South Carolina. It was from this home that she received a telephone call from Sammy Whitfield on May 28, 1997, to set up a June 4, 1997, delivery of one-half pound of methamphetamine, a June 4, 1997, telephone call to arrange another delivery to Whitfield, and subsequent calls on June 5, 1997, in anticipation of Whitfield's delivery of $21,400 towards the purchase of an additional pound of methamphetamine. Following Whitfield's delivery of the cash to Gaston on June 5, law enforcement officers executed a search warrant at her home and found Federal Express packaging like that used to deliver the drugs to Whitfield, the California address of the drug source, foil-wrapped packages of cash in $7500 increments, two ounces of methamphetamine, scales, and the $21,400 Whitfield gave to Gaston.

Citing civil in rem forfeiture cases establishing the standards for civil forfeitures, Gaston argues that the Government failed to establish a nexus between the forfeited property and the crime of conviction. However, civil in rem forfeiture standards do not apply to criminal in personam forfeitures, such as this one. *See United States v. Wild*, 47 F.3d 669, 674 (4th Cir. 1994).

Gaston also contends that the forfeiture of her home and land were not proportional to the crime of conviction. Because a criminal forfeiture ordered pursuant to 21 U.S.C. § 853(a) (1994) is an element of the sentence imposed following a defendant's conviction for substantive drug offenses, and therefore properly characterized as punishment, *see Libretti v. United States*, 516 U.S. 29, 38-39 (1995), our sole inquiry in analyzing whether the forfeiture is constitutionally excessive is whether the forfeiture "is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 118 S.Ct. 2028, 2036 (1998); *see Wild*, 47 F.3d at 676 (stating that the

excessiveness inquiry "beckons a comparison of the value of the property being forfeited to the gravity of the offense committed by the defendant and the nature and extent of the defendant's activities").

The Government presented evidence linking Gaston and her home to the June 3 to June 6, 1997, drug conspiracy for which Gaston was convicted. The Government also presented evidence that Gaston was responsible for three to ten kilograms of methamphetamine. Based on Gaston's offense level of 36, and criminal history category I, Gaston faced fines of $20,000 to $200,000. *See U.S. Sentencing Guidelines* § 5E1.2(c)(3) (1997). The full value of Gaston's property before the partition was $240,000. We find that forfeiture of Gaston's home was not grossly disproportional to the gravity of her offense.

Finally, Gaston challenges the amount of drugs the district court attributed to her for sentencing purposes. We review for clear error a district court's factual finding of the relevant quantity of drugs at sentencing. *See* 18 U.S.C. § 3724(e) (1994); *United States v. Fletcher*, 74 F.3d 49, 55 (4th Cir. 1996).

Under the sentencing guidelines, a district court must make an independent resolution of the amount of drugs that can be attributed to a defendant whenever that amount is in dispute. *See U.S. Sentencing Guidelines* § 6A1.3(b). In a case such as this, "'[w]here . . . the amount [of drugs] seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.'" *United States v. D'Anjou*, 16 F.3d 604, 614 (4th Cir. 1994) (quoting *U.S. Sentencing Guidelines* § 2D1.1, comment. (n.12)). The sentencing guidelines do not demand certainty and precision; they demand that a court do the best that it can with the evidence in the record, erring on the side of caution. *See United States v. Cook*, 76 F.3d 596 604 (4th Cir. 1996); *United States v. Uwaeme*, 975 F.2d 1016, 1019 (4th Cir. 1992). Thus, we afford the district court broad discretion in making this estimate. *See Cook*, 76 F.3d at 604. The court may also include for sentencing purposes quantities of drugs that were part of the same course of conduct or the same common scheme or plan as the crime of conviction. *See* USSG § 1B.1.3(a)(2); *United States v. Cousineau*, 929 F.2d 64, 67 (2d Cir. 1991).

Sammy Whitfield testified that Gaston made two deliveries of one-half pound of methamphetamine to him and that he ordered another

pound of methamphetamine from her all within the dates of the conspiracy. He also testified that he had received one-half to one pound of methamphetamine from Gaston per month for eighteen months. The district court found Whitfield's testimony reliable and truthful and also concluded that the drug transactions between Whitfield and Gaston for the eighteen-month period prior to the charged conspiracy were part of the same course of conduct as the charged conspiracy or were part of a common scheme or plan. Conservatively calculating the amount of methamphetamine attributable to Gaston as one-half pound per month for eighteen months (nine pounds), plus two pounds for the June 5 and 6 deals, the Government attributed a total of eleven pounds of methamphetamine to Gaston. This converts to 4.9896 kilograms.

Relying on these numbers, the district court attributed to Gaston more than three but less than ten kilograms of methamphetamine. We conclude that these findings are not clearly erroneous.

For these reasons, we affirm Gaston's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED